

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM E. KASBEN,

Plaintiff-Appellant,

v

BERYL W. HOFFMAN,

Defendant-Appellee.

UNPUBLISHED

March 24, 2005

Nos. 247297;253201;254295

Leelanau Circuit Court

LC No. 96-003816-DO

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

I. Overview

Plaintiff William Kasben appeals four trial court orders in these three consolidated cases arising from his divorce from defendant Beryl Hoffman.¹ In Docket No. 247297, Kasben appeals Judge John Unger's February 20, 2003 order amending the divorce judgment (the Second Amended Judgment). In Docket No. 253201, Kasben appeals Judge Philip Rodgers' October 17, 2003 orders regarding Hoffman's motion for attorney fees and costs (the Attorney Fees Order) and regarding Kasben's motion for the disbursal of escrowed funds (the Escrowed Funds Order). In Docket No. 254295, Kasben appeals Judge Rodgers' February 20, 2004 order awarding Hoffman sanctions (the Sanctions Order). We affirm in part, reverse in part, and remand for corrections to the Escrowed Funds Order to be completed within sixty-three days.

II. Basic Facts And Procedural History

It has now been nine years since this divorce proceeding began. In the latest chapter of this protracted litigation, Judge Unger, acting on this Court's instructions on remand, determined which of the parties' assets were marital and which were separate, then divided the marital estate equitably by considering the appropriate factors. The trial court also awarded Hoffman attorney fees and costs. A summary of this decision – and the plethora of motions and orders it engendered – follows.

¹ Although defendant is now known as Beryl Wilson, for the sake of consistency with previous proceedings, this opinion retains her previous name, Beryl Hoffman.

A. The Decision On Remand

After a March, 2002 hearing, Judge Unger issued his decision on remand. At the outset, Judge Unger found that, while both parties lacked credibility, Hoffman presented trial exhibits that generally corroborated her positions while Kasben's testimony was "evasive, argumentative, and inconsistent," and included at least one "bold faced fraud." Accordingly, Judge Unger concluded that unless Kasben's testimony was either corroborated or uncontested, he "simply could not believe it."

Judge Unger considered the ages of the parties, life status and ability to earn, contributions, the parties' conduct, fault, and the parties' needs in dividing the property, and concluded that Hoffman's needs substantially outweighed Kasben's. With respect to the parties' conduct, Judge Unger characterized Kasben's strategy in the marriage as "to sweep an older woman off her feet, invite her to spend large sums of money to enhance his run down farm, to use his father as a haven to hide assets or avoid debts, and when [Hoffman's] money ran out[,] to hound her into bankruptcy." Judge Unger accordingly found that fault, to the extent it applied as a factor, lay with Kasben.

Judge Unger found that Kasben's separate property consisted of nine parcels of land, while Hoffman's separate property included the antiques she already received plus a banjo clock and a curio cabinet; any stocks, bonds, or retirement funds in her name prior to marriage; and "a series of pre-marriage loans by [Hoffman] to [Kasben], acknowledged by [Kasben] to total at least \$75,000." Judge Unger found that the marital farm was, in fact, marital property, and that the parties had contributed equally to its appreciation. Judge Unger deducted the \$90,000 owed to Kasben's father, Ed Kasben, for his land contract interest in the marital farm, from the \$383,000 tax assessor's value to reach a net value of \$293,000 at the time of trial. Judge Unger awarded the marital farm to Kasben, but ordered him to pay Hoffman her share of \$146,500.

Judge Unger concluded that \$60,000 worth of electrical equipment was joint marital property to which each party contributed equally after finding that Hoffman had acted as the bookkeeper, manager, and the banker for Kasben's electrical business both before and during the marriage. Judge Unger allowed Kasben to keep the equipment, but awarded Hoffman half its value, or \$30,000. Judge Unger then found that Kasben had attempted to hide certain assets throughout the proceedings, including proceeds from a timber cutting, jointly owned farm equipment, and Hoffman's banjo clock and curio cabinet. Judge Unger awarded Hoffman the entire value of these assets, which was \$81,500.

In accordance with these findings, Judge Unger determined that Kasben was to pay Hoffman \$333,000 with 7% interest accruing annually. Judge Unger reserved the issue of attorney fees, stating that he would award them if an application was filed and adequately supported. Judge Unger ordered Kasben's counsel to submit a proposed judgment consistent with his decision.

B. The First Amended Judgment

In accordance with Judge Unger's decision, Kasben filed a proposed amended judgment specifying that Kasben was to pay Hoffman \$333,000 "less any money already received by [Hoffman] or her trustee in bankruptcy." Hoffman objected to Kasben's proposed amended

judgment on the ground that inclusion of the phrase “or her trustee in bankruptcy” was not consistent with the trial court’s decision, and Hoffman submitted a proposed amended judgment of her own omitting this phrase. Judge Unger found that Hoffman’s order comported with his decision, and entered it as the “amended judgment of divorce after remand.” Kasben responded by filing a motion for amended judgment, and also filed a motion for a return of the properties known as the Boone Farm and the marital farm, or the proceeds from their sale.

C. The Second Amended Judgment

After a hearing on Hoffman’s motion for attorney fees and costs, Kasben’s motion to amend the judgment, and Kasben’s motion for return of property, Judge Unger issued the Second Amended Judgment. Judge Unger denied Kasben’s motion for return of the Boone Farm “because of the supervening rights of third parties who are not parties to this action and over whom the Court has no personal jurisdiction.” Judge Unger also denied Kasben’s motion for return of the marital farm because Hoffman had reconveyed it to Kasben “on mutually agreeable terms.” Judge Unger dissolved the lien on the marital farm because he found that Kasben had compensated Hoffman before the order was issued. Next, the order stated: “Considering the payment made to Ed Kasben by the parties and the payment made by [Kasben] to [Hoffman], it appears [Hoffman] owes [Kasben] \$42,000.” Finally, Judge Unger ordered that the September 4, 2002 judgment after remand would remain in force in all other respects, and stated that except for the issue of Hoffman’s attorney fees, on which an evidentiary hearing would be held, the order represented a final judgment in the matter.

Both parties took issue with the Second Amended Judgment. Hoffman filed a motion to amend the order and/or for relief from the order on the ground that the trial court had failed to account for costs associated with the marital farm auction, and had also used an incorrect figure for Ed Kasben’s lien on the marital farm. For his part, Kasben filed a claim of appeal to this Court challenging the amended judgment of divorce, the reservation of the attorney fee issue, and Judge Unger’s refusal to return the Boone Farm or its proceeds to Kasben.² This appeal is Docket No. 247297.

Meanwhile, on April 9, 2003, the case was reassigned from Judge Unger to Judge Rodgers, who cancelled the evidentiary hearing on attorney fees. Judge Rodgers denied Kasben’s motion to adjourn the hearing until after the appeal, overruled the parties’ objections to the order canceling the hearing on attorney fees, and ordered Hoffman to resubmit her motion for attorney fees within twenty-eight days along with an affidavit that those fees were reasonable and necessarily incurred, a brief citing legal authority for awarding fees in a divorce action, and evidence that Hoffman was unable to pay the legal expenses while Kasben was able to do so.

² Kasben filed a successful motion to strike Hoffman’s brief on appeal for including references to matters outside the record. This Court granted Hoffman twenty-one days to submit a conforming brief, but she did not do so, nor did she submit a brief in the other two consolidated cases.

D. The Attorney Fees Order

Judge Rodgers ruled on Hoffman's motion for attorney fees on September 15, 2003. Judge Rodgers first found that there was "ample evidence in the record" that Hoffman was unable to bear the cost of litigation while Kasben was, because during the divorce Hoffman was "destitute and unable to practice her profession," while Kasben had "substantial real estate holdings."

Second, Judge Rodgers made the following findings respecting Kasben's conduct:

The fact that it has taken in excess of 7½ years to dissolve a 3-year marriage speaks volumes. Nothing in this case has been done by agreement. The record is replete with incidences of [Kasben's] recalcitrance. To say that his behavior was calculated to annoy and harass or to lengthen, obfuscate and delay the proceedings is an understatement. [Kasben] routinely violated orders of the Court, secreted assets and refused to cooperate in identifying and dividing assets. [Kasben] objected to nearly every pleading [Hoffman] filed. [Kasben] objected to or appealed every final order and judgment of the Court. [Hoffman's] Chapter 7 bankruptcy proceeding is still pending after 5½ years for the same reasons.

[Kasben] has persistently engaged in unreasonable behavior designed to annoy, harass and destroy [Hoffman]. He has engaged in a course of conduct designed to lengthening [sic] these proceedings through obfuscation and delay.

Judge Rodgers concluded that Hoffman was entitled to "substantial attorney fees."

Third, Judge Rodgers found that Hoffman should not be awarded more than the \$72,000 in fees actually incurred before July 31, 2001, as indicated by the bankruptcy court's award. However, Judge Rodgers concluded that Hoffman was entitled to prove that she incurred attorney fees beyond the \$25,000 from the 1999 trial. Accordingly, Judge Rodgers ordered Hoffman to resubmit her monthly billing statements so that he could determine the amount of fees that had been incurred since July 31, 2001.

After receiving this information, Judge Rodgers ruled:

The billing statements [Hoffman submitted] show a bottom line balance due of \$171,121.71. However, the billing statements build on a previous balance of \$90,678.01. This Court has already awarded the Defendant \$72,000 for all fees incurred through July 31, 2001. These billing statements also include several expenses totaling \$1,241.52 for which no statute or court rule provides recovery; \$11,543.08 in accrued interest which is calculated on erroneous amounts, including the balance due before July 31, 2001 and which exceeds the simple 7% per annum allowed; \$2,560.50 which was actually for attorney fees incurred in connection with [Hoffman's] malpractice action against her bankruptcy attorney; and a mathematical error which results in an overcharge of \$3,564.50.

After making the necessary adjustments for these things, the Court finds that [Hoffman] incurred reasonable and necessary attorney fees in the amount of

\$130,098, incurred recoverable expenses in the amount of \$325, and that interest accrued in the amount of \$14,383.01, for a total of \$144,806.01.

Kasben appealed the Attorney Fees Order to this Court on January 1, 2004 in Docket No. 253201.

E. The Escrowed Funds Order

On June 23, 2003, Kasben moved for the trial court to release to him the nearly \$126,000 of Hoffman's escrowed bankruptcy proceeds that had been turned over to Judge Unger, arguing that Hoffman had already received the money she was due under the amended judgment of divorce after remand and actually owed Kasben restitution for the wrongful sale of the Boone Farm and the marital farm. After a hearing, Judge Rodgers ruled:

Under the amended judgment of divorce after remand, [Kasben] is required to pay [Hoffman] \$376,620, plus attorney fees and costs which have now been awarded in the amount of \$144,806.01. Therefore, [Kasben] owes [Hoffman] a total of \$521,426.01. However, because [Hoffman] received and liquidated real estate which was later determined to belong to [Kasben], [Kasben] is entitled to a credit for the value of that real estate. According to paperwork filed in the bankruptcy proceeding, the Trustee received a total of \$565,881.09 against what he owes [Hoffman]. In summary, [Kasben] owes [Hoffman] \$521,426.01. He is entitled to a credit of \$565,881.09. The difference is \$44,455.08.

Of the \$125,989.98 that is in the escrow account, \$44,455.08 should be disbursed to [Kasben] and \$81,534.90 should be disbursed to [Hoffman] and her attorney, Gary R. Bergstrom, jointly and severally.

Kasben's claim of appeal regarding the Attorney Fees Order in Docket No. 253201 included allegations of mathematical errors contained in the Escrowed Funds Order, which was issued on the same day.

F. The Sanctions Order

In addition to his appeals to this Court, Kasben also filed a motion before Judge Rodgers for a new trial and stay of proceedings on the ground that he was wrongfully denied a trial on the attorney fee issue, that the fee award was excessive and contrary to law, and that Judge Rodgers' findings contained factual errors. However, Judge Rodgers denied Kasben's motion, stating that it was "nothing more than a mislabeled motion for reconsideration" that presented the same issues that the trial court had already ruled on, either explicitly or implicitly. Judge Rodgers concluded that Kasben did not demonstrate a palpable error that would require him to grant the motion. Judge Rodgers went on to find that the motion, "like so much of [Kasben's] conduct over the life of this litigation," was "frivolous" and brought to harass Hoffman and further increase the cost of litigation. Accordingly, Judge Rodgers ordered sanctions against Kasben and his attorney pursuant to MCR 2.114, and ordered Hoffman to file an affidavit of fees and expenses incurred in defending the motion. Judge Rodgers ultimately granted Hoffman's request for \$3,535.70 in sanctions, made Kasben and his attorney jointly and severally liable for

payment, and ordered that they would be deemed in contempt of court if it was not paid within twenty-eight days. Kasben appealed the Sanctions Order on March 9, 2004 in Docket No. 254295.

III. Docket No. 247297: The Second Amended Judgment

A. Standards Of Review

In addressing Kasben's challenges to Second Amended Judgment, we review the dispositional ruling itself for whether it was fair and equitable in light of the facts, and will affirm the trial court's decision unless we are "left with the firm conviction that the division was inequitable."³ We review de novo issues that present questions of law,⁴ and we review the trial court's findings of fact for clear error.⁵

B. Title To The Marital Property; Validity Of The Land Contract

1. Kasben's Argument

Kasben argues that Judge Unger erred in failing to rule on who had title to the marital farm. The parties deeded the farm to Kasben's father with an option to repurchase it on a land contract if they paid the amount the bank demanded within 90 days. The land contract that the parties executed contained the following addendum:

The purchasers agree that within 90 days of this date that they are going to have a sale of their personal property in order to pay the balance due on the mortgage with Old Kent Bank on the above described property, said sale to be for the purpose of obtaining sufficient funds to pay the balance due to pay off the mortgage and they further agree that if there are not enough funds raised from the sale, that they will pay any and all costs including but not limited to interest, on a loan that the seller may have to obtain in order to pay off the balance due. The purpose of paying off the mortgage with Old Kent Bank is to be able to place Edwin J. Kasben [Kasben's father] as first lien holder on the property in place and stead of the bank.

Kasben argues that the land contract never became effective because the balance due on the mortgage was not paid within ninety days. Kasben contends that the monetary award to Hoffman based on the value of the marital farm should be reversed because there was "no evidence on the record to support the validity of the land contract."

³ *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

⁴ See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75; 467 NW2d 21 (1991).

⁵ *Id.* at 34.

2. This Court's Prior Holding; Law Of the Case

In the prior case, this Court explicitly stated that “there was no evidence to indicate that the land contract from plaintiff’s father to plaintiff and defendant was invalid.” The opinion cited *Sparling v Bert*,⁶ in which this Court addressed an identical provision and held that a default does not automatically result in forfeiture; rather, the seller must provide proper notice of the intention to declare the contract forfeited.⁷

Under the law of the case doctrine, “if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.”⁸ “Additionally, under the doctrine, if an appellate court decides a legal question, the lower court is also bound by that legal decision on remand.”⁹ Because this Court had already ruled that the failure to adhere to the terms of the addendum did not invalidate the land contract, we conclude that Judge Unger did not err in failing to decide this issue.

C. Application Of Preclusion Doctrines

1. Kasben's Argument

Kasben argues that Judge Unger was prevented from awarding \$81,500 in “hidden assets,” \$30,000 for electrical equipment, and \$75,000 for a loan that predated the parties’ marriage, by the law of the case doctrine.

2. This Court's Prior Holding And Order On Remand

Neither res judicata nor the law of the case doctrine barred the Judge Unger’s ability to make different factual findings after remand than he did at the 1999 trial. This is so because this Court reversed the original judgment and declared it void on remand. This Court specifically ordered that, on remand, “the trial court must determine which assets are marital and which are separate,” then “consider the appropriate factors to divide the parties’ marital estate equitably.” Because issues regarding the hidden assets, the loan, and the electrical equipment were all argued on the record in the 1999 trial, we conclude that Judge Unger properly made findings respecting these items.

⁶ *Sparling v Bert*, 1 Mich App 167, 170-171; 134 NW2d 840 (1965).

⁷ *Id.*

⁸ *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000), citing *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981).

⁹ *South Macomb*, *supra* at 655, citing *Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000).

D. Restoring Hoffman To Her Previous Financial Condition

1. Kasben's Argument

Kasben argues that the law of the case doctrine prevented Judge Unger from “arbitrarily” restoring Hoffman to her premarital financial condition.

2. Judge Unger's Order

It is clear from the Judge Unger's decision on remand that he did not reach the disposition arbitrarily. Rather, as required, Judge Unger made factual findings respecting which property was separate and which was marital¹⁰ and considered the relevant factors for dividing the marital assets.¹¹

Judge Unger found that Kasben's separate property consisted of nine parcels of land, while Hoffman's separate property included her antiques; any stocks, bonds, or retirement funds in her name prior to marriage; and a series of pre-marriage loans she had made to Kasben totaling \$75,000. Judge Unger found that the marital farm was marital property, and that the parties had contributed equally to its appreciation. Judge Unger awarded the farm to Kasben, but ordered him to pay Hoffman her share of half its value. Judge Unger also found that \$60,000 worth of electrical equipment was joint marital property because of Hoffman's contributions to Kasben's business. Judge Unger allowed Kasben to keep all the equipment, but awarded Hoffman half their value, or \$30,000.

Finally, Judge Unger found that Kasben had attempted to hide certain assets throughout the proceedings, including proceeds from a timber cutting, jointly owned farm equipment, and a “banjo clock” and curio cabinet belonging, separately, to Hoffman. Judge Unger awarded Hoffman the entire value of these assets, which was \$81,500. This action was legally supported by this Court's holding in *Sands v Sands*.¹² This Court held in *Sands* that it is inconsistent with the equitable requirement of “clean hands” to award a spouse any share of assets that he or she attempted to conceal.¹³ Judge Unger did not invade Kasben's separate assets to fashion the award.

It is true that Judge Unger made statements on the record suggesting that he could reach the same result as that reached in the original judgment if he used a proper method to do so. However, the scope of our review extends only to whether Judge Unger's factual findings were clearly erroneous or whether the disposition was inequitable. If these tests were met, we need not – and, indeed, may not – consider Judge Unger's alleged ulterior motive for rendering the

¹⁰ See *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997).

¹¹ See *Sparks*, *supra* at 159-160.

¹² *Sands v Sands*, 442 Mich 30; 497 NW2d 493 (1993).

¹³ *Id.* at 33.

judgment. Because Judge Unger's decision was manifestly not arbitrary, we will not reverse on that basis.

E. Electrical Equipment

1. Kasben's Argument

Kasben argues that Judge Unger clearly erred in awarding Hoffman half of the value of the electrical equipment.

2. Hoffman's Testimony

Hoffman's testimony indicated that she was authorized to, and did, write checks from the Kasben Electric account, from which we infer that Hoffman contributed some work to the business. Further, Hoffman indicated that the electrical equipment was purchased using her funds. Having reviewed the entire record, we are not left with a firm and definite conviction that Judge Unger made a mistake,¹⁴ and therefore will not reverse on this issue.

F. Evidence Outside The Record

1. Kasben's Argument

Kasben argues that Judge Unger violated his right to due process by relying on material facts outside the record to fashion the award. Kasben's only specific allegation on this point is that Judge Unger indicated that he had reviewed the court-appointed receiver's reports to conclude that Kasben had hidden \$60,000 in farm equipment. Kasben asserts that these reports were not in evidence at the 1999 trial.

2. Judge Unger's Finding

As Kasben acknowledges elsewhere in his own brief, Judge Unger's finding was based on trial testimony, not the receiver's reports. Specifically, Hoffman testified at trial that in April of 1997, her attempts to organize an auction with the court-appointed receiver were foiled by Kasben's conduct, including locking one auctioneer off the property and refusing to turn over "approximately \$60,000 worth of equipment" that he had removed from the property. Hoffman further testified that she was aware that the receiver had filed two motions to retrieve the property from Ed Kasben's farm, and that the receiver sought contempt citations against Kasben and his attorney for failing to do so. Because this testimony was admittedly the basis on which Judge Unger based his decision to award the equipment to Hoffman, we conclude that reversal on due process grounds is not required.

¹⁴ *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002).

G. Findings Regarding Premarital Debt And Hidden Assets

1. Kasben's Argument

Kasben argues that Judge Unger erred in awarding Hoffman \$75,000 for a premarital loan that he claimed did not exist, \$17,000 in timber sales from the marital property, and \$60,000 in farm equipment.

2. Witness Credibility

We begin our analysis with Judge Unger's observation that while neither Kasben nor Hoffman was completely credible, Hoffman generally presented trial exhibits that corroborated her positions while Kasben's testimony was "evasive, argumentative, and inconsistent," and included at least one "bold faced fraud." Accordingly, Judge Unger ruled that "unless there was some corroboration of [Kasben's] testimony, or it was uncontested, the court simply could not believe it." We defer to Judge Unger's determinations on issues of credibility because he was in a superior position to observe the parties' demeanor.¹⁵

3. The \$75,000 Loan

Judge Unger based his decision with respect to the \$75,000 loan on a letter from Kasben to his father and, apparently, his father's banker, that read, in relevant part, "This note etc is legimate [sic] I owe Beryl 75,000 cash . . . I didn't want you to know how bad off financially I really was or I would have told you this in person." At trial, Kasben acknowledged that he had written the note, and agreed that it read "I owe Beryl 75,000 cash," but denied that this meant that he owed her that amount. Contrary to Kasben's assertion, other evidence at trial indicated that Hoffman had loaned Kasben substantial amounts of money, including \$20,000 evidenced by a promissory note. Given Kasben's questionable credibility, we conclude that Judge Unger did not clearly err relying on this written document rather than Kasben's testimony.

4. Proceeds From The Timber Sale

Similarly, we conclude that Judge Unger did not clearly err in relying on Hoffman's trial testimony that Kasben had deposited the proceeds from a timber sale, which took place while Hoffman was away, into his father's account. Kasben's assertion that other timber sales had been deposited into their joint account or into Hoffman's account had no bearing on whether Kasben disclosed this particular timber sale. We conclude that Judge Unger did not clearly err in determining, based on Hoffman's testimony, that Kasben attempted to conceal over \$17,000 in assets by depositing them into his father's account.

¹⁵ MCR 2.613(C); *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000).

5. Farm Equipment

With respect to the farm equipment, Kasben admits that he removed the property to protect it from being auctioned because, according to Kasben, he and his attorney both believed that these assets were premarital equipment not subject to auction. However, this determination was not Kasben's to make, particularly in light of the fact that a court had ordered the auction of those assets. "A party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt and possibly being ordered to comply with the order at a later date."¹⁶ Under the circumstances, we are not left with a definite and firm conviction that Judge Unger erred in finding that Kasben had attempted to conceal marital property.

6. Finding Of Fault

The fact that Judge Unger did not make a finding of fault in his 1999 opinion is not relevant. This Court indicated that the trial court's method of dividing the parties' assets was improper and Judge Unger ordered the 1999 judgment nullified. Thus, Judge Unger was free to reach different conclusions on remand as long as they comported with the law. On remand, Judge Unger made a finding of fault pursuant to *Sparks*,¹⁷ then ordered the hidden assets forfeited pursuant to *Sands*.¹⁸ We find no error.

H. Issues Regarding Restitution And Evidentiary Hearing On Fees

Kasben argues that Judge Unger erred in granting Hoffman an evidentiary hearing only on the question of attorney fees and in failing to order restitution for the sale of the real estate awarded him in the judgment after remand. Our review of the record indicates that Judge Rodgers subsequently cancelled the evidentiary hearing¹⁹ and awarded Kasben a credit for the value of the real estate.²⁰ Accordingly, these issues are now moot. Whether Judge Rodgers erred in allowing Hoffman to recover attorney fees in excess of those awarded in the 1999 judgment will be addressed below.

¹⁶ *Kirby v Michigan High Sch Ath Ass'n*, 459 Mich 23, 40; 585 NW2d 290 (1998), citing *In re Hague*, 412 Mich 532, 544-545; 315 NW2d 524 (1982).

¹⁷ See *Sparks*, *supra*.

¹⁸ See *Sands*, *supra*.

¹⁹ See Order, May 29, 2003, p 2.

²⁰ Order, October 17, 2003.

I. Conclusion

In summary, we conclude that:

(1) Judge Unger did not err in failing to rule on who had title to the marital farm, given this Court's previous holding that "there was no evidence to indicate that the land contract from plaintiff's father to plaintiff and defendant was invalid."

(2) Judge Unger properly made findings respecting the hidden assets, the loan, and the electrical equipment, all of which were argued on the record in the 1999 trial.

(3) Judge Unger's decision was manifestly not arbitrary when he attempted to restore Hoffman to her premarital financial condition.

(4) Judge Unger did not make a mistake when he awarded Hoffman half of the value of the electrical equipment.

(5) Judge Unger's findings were not based on material outside the record as they were based on trial testimony, not the receiver's reports.

(6) Judge Unger did not err when he awarded Hoffman \$75,000 for a premarital loan, \$17,000 in timber sales from the marital property, and \$60,000 in farm equipment. On remand, Judge Unger properly made a finding of fault pursuant to *Sparks*, then ordered the hidden assets forfeited pursuant to *Sands*.

(7) The question of attorney fees and restitution for the sale of the real estate awarded are dealt with below.

IV. Docket No. 253201: The Attorney Fee Order And The Escrowed Funds Order

A. Standard Of Review

We review the trial court's decision to award attorney fees for an abuse of discretion.²¹ We likewise review the trial court's determination of the amount of attorney fees for an abuse of discretion,²² as we do the trial court's decision that an evidentiary hearing on fees was unnecessary.²³

²¹ *Schoensee v Bennett*, 228 Mich App 305, 314; 577 NW2d 915 (1998).

²² *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995).

²³ *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

B. The Attorney Fee Order

1. Limits On Attorney Fees

a. Kasben's Argument

Kasben argues that Hoffman waived her right to claim attorney fees exceeding those she incurred through the 1999 trial by moving to “limit[] the scope of the remand to a decision based on the factual record already established.”

b. Hoffman's Motion

We note that Hoffman's motion stated that this limitation applied to the “two narrow grounds” on which this Court reversed the original divorce judgment: the failure to distinguish marital and separate property and the attempt to restore the parties to their premarital financial condition. Nothing in the motion itself, and nothing discussed at the motion hearing, suggests that the determination of attorney fees would also be limited to the record. The request for relief supports this view: Hoffman sought an order that would limit the scope of the remand to the trial record “from which . . . a judgment can be rendered which comports with the Decision of the Court of Appeals *on the narrow issues upon which it reversed the trial court's Judgment of Divorce*.” Hoffman separately requested that the trial court award her “any and all costs, fees and other expenses she incurs as the Court may deem just and appropriate,” and she was authorized to do so “at any time . . . including [for] a post-judgment proceeding” under MCR 3.206(C)(1). Further, Kasben's assertion that Hoffman lost on appeal is incorrect. This Court specifically held that neither party fully prevailed on appeal. We conclude that Kasben's attempts to prevent Hoffman from recouping her attorney fees for his numerous post-trial motions are unfounded.

2. Record Support For The Attorney Fee Order

a. Kasben's Argument; MCR 3.206(C)

Kasben argues that the record did not support the Attorney Fee Order. Judge Rodgers awarded Hoffman attorney fees based on MCR 3.206(C), which provides:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

b. Judge Rodgers' Findings

Judge Rodgers found that Hoffman could not afford to pay her attorney fees, and that Kasben could afford them. Kasben argues that both these findings were unfounded or, at best, were supported only through 1999, not through 2003. However, Judge Rodgers found in 2002 that Hoffman was either still in or only recently out of bankruptcy. He further found that, because Hoffman was no longer licensed to practice law, she had few skills with which to earn a living. Hoffman testified that she had “essentially lived out of [her] car” for 2½ years until moving out of state in 1998 so her children could help support her. As recently as December 1, 2003, Hoffman requested an extension on a filing deadline because she could not afford to retain an attorney. We will find an abuse of discretion only where the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.²⁴ Judge Rodgers' determination that Hoffman could not afford to bear the expense of further litigation does not meet this standard.

In making the determination regarding the parties' life status and ability to earn, Judge Rodgers found that Kasben, while cash-poor, had a net worth “at a high six figure level” because of his extensive property holdings, because he was a licensed master electrician, because he continued to live in the marital farm, and because he “had a new ‘partner’ pouring money into his farming ventures.” Judge Rodgers found that Kasben would “use his father as a haven to hide assets or avoid debts.” In light of these findings, we conclude that Judge Rodgers did not abuse his discretion in concluding that Kasben was able to pay Hoffman's attorney fees.

Judge Rodgers also supported the Attorney Fee Order with his finding that Kasben had engaged in unreasonable conduct that caused Hoffman to incur unnecessary fees. Kasben responds that Hoffman caused the delays in this case, and even if he should have paid a portion of Hoffman's attorney fees, he should not have been ordered to pay them all because they were not all caused by his unreasonable conduct. However, because the Attorney Fee Order was fully supported by his ruling under MCR 3.206(C)(2)(a), we need not reach this issue.

C. Lack Of Evidentiary Hearing On Attorney Fees

1. Kasben's Argument; Legal Standards

Kasben argues that it was unfair for Judge Rodgers to award attorney fees incurred after the 1999 trial without an evidentiary hearing. Generally, when a party challenges the reasonableness of the fee requested, the trial court should “inquire into the services actually rendered prior to approving the bills of costs.”²⁵ “Although a full-blown trial is not necessary” to

²⁴ *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

²⁵ *B & B Inv Group v Gitler*, 229 Mich App 1; 581 NW2d 17 (1998), quoting *Wilson v General Motors Corp*, 183 Mich App 21, 42; 454 NW2d 405 (1990).

this inquiry, “an evidentiary hearing regarding the reasonableness of the fee request is.”²⁶ However, if the record is sufficient to review the issue, an evidentiary hearing is not required.²⁷

2. Judge Rodgers’ Findings

Kasben’s complaint is not with the reasonableness of the fee request, but rather with the fact that Hoffman was allowed to request any fees after the 1999 trial, thus requiring Judge Rodgers to make factual findings outside the agreed-on 1999 trial court record. As addressed above, however, Hoffman was permitted to request post-trial attorney fees at any time; thus, Judge Rodgers of necessity required documentation on the issue. Contrariwise, the issues for which Kasben wished to reopen proofs had already been litigated at the 1999 trial, and facts regarding those issues were on the record. We conclude that Kasben’s argument is without merit.

D. The Escrowed Funds Order

1. Kasben’s Argument

Kasben argues that Judge Rodgers erred in calculating the amount of escrowed funds to which he was entitled because the amended divorce judgment was \$288,000, not \$376,620. Kasben bases this argument on the Second Amended Judgment, in which Judge Unger concluded, without explanation, that “it appeared” Hoffman owed Kasben \$42,000. Kasben offers the following explanation for this figure: Kasben bought the marital farm from Hoffman’s bankruptcy trustee for \$510,000, of which \$180,000 – not \$90,000, as Judge Unger had previously found – was paid to Ed Kasben for his land contract interest in the farm. Thus, Hoffman’s bankruptcy trustee received \$330,000 net proceeds from Kasben’s purchase of the marital farm. Kasben concludes that Judge Unger then subtracted half of the \$90,000 correction to the Ed Kasben lien from the amount of the first amended judgment – which was \$333,000 – to arrive at \$288,000, then subtracted the \$330,000 Kasben had already paid to Hoffman’s trustee in purchasing the marital farm to conclude that Hoffman owed Kasben \$42,000.

2. Judge Rodgers’ Finding

Setting aside for a moment the question whether these calculations are correct, Kasben’s explanation of how Judge Unger arrived at the \$42,000 figure is consistent with discussions on the record at the motion hearing. However, for reasons that are not apparent from the record, Judge Rodgers did not acknowledge the Second Amended Judgment when ruling on Kasben’s motion for escrowed funds. Instead, Judge Rodgers referred to the *first* amended judgment of divorce after remand to conclude that Kasben was required to pay Hoffman \$376,620, as well as \$144,806.01 in attorney fees and costs. Thus, Judge Rodgers concluded that Kasben owed

²⁶ *Id.* at 42-43.

²⁷ *Id.*, citing *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999); *Giannetti Bros Const Co, Inc v City of Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989).

Hoffman a total of \$521,426.01. Judge Rodgers then found that Kasben was entitled to a credit for the value of the real estate that was sold during Hoffman's bankruptcy proceeding. Referring to "paperwork filed in the bankruptcy proceeding," Judge Rodgers concluded that the trustee received a total of \$565,881.09 from those sales. Judge Rodgers credited Kasben this amount, subtracted the \$521,426.01 he owed Hoffman, and concluded that Kasben was entitled to \$44,455.08 of the escrowed funds.

3. Cutting The Gordian Knot

While we applaud Judge Rodgers' attempt to cut the Gordian knot, the Escrowed Funds Order raises several questions. Most obviously, the Escrowed Funds Order incorrectly states the amended judgment amount as \$330,000 instead of \$333,000, and the interest as eight rather than seven percent. Were this the only point of contention with the Escrowed Funds Order, we would be in a position to correct those errors. However, the larger question is why the Escrowed Funds Order is based on the *first* amended judgment rather than the Second Amended Judgment. The fact that the Escrowed Funds Order does not acknowledge the existence of the Second Amended Judgment makes it impossible for us to determine whether Judge Rodgers simply overlooked that order in the blizzard of rulings that this case has generated, or whether he intentionally rejected Judge Unger's findings, and, if so, on what basis. Loath as we are to prolong this case any further, we find ourselves unable to reconcile Judge Rodgers' Escrowed Funds Order with Judge Unger's Second Amended Judgment without engaging in speculation. Therefore, in the interest of ensuring that this case is not only finished but also finished correctly, we reverse the Escrowed Funds Order as well as the Second Amended Judgment and remand for corrections or clarifications on the following issues, and these issues alone:

First, our review of the record reveals that confusion remains regarding how much Hoffman's bankruptcy trustee actually received from the sale of the marital and Boone farms. We are troubled by the apparent reliance on a single document filed with the bankruptcy court to determine the net amount paid to Hoffman's bankruptcy trustee, particularly in light of the fact that the document in question was a pleading rather than an order, and both parties disputed the \$565,881.09 amount listed in that document. We are also puzzled by the conclusion that Ed Kasben's interest in the marital farm was \$180,000 when all the evidence before this Court indicates that his land contract interest was only \$90,000. Therefore, on remand, we direct the trial court to determine, through further factual findings if necessary, the amount of credit to which Kasben is entitled for the sale of the marital and Boone farms.

Second, Judge Rodgers charged Kasben interest on the amount of the original judgment despite the fact that Kasben had apparently satisfied the judgment in full when his property was sold to benefit Hoffman's trustee in bankruptcy. Accordingly, on remand, we direct the trial court either to deduct the interest charged on the judgment or to explain why charging interest was justified.

We direct the trial court to issue a revised order disbursing escrowed funds that resolves these two issues within sixty days of the release date of this opinion.

4. Compound Interest

Kasben argues that Hoffman's attorney improperly charged compound interest "every month in his billings before 2001." Kasben offers no beginning date for this alleged malfeasance, nor does he offer any citations to documents contained in the record that would support this allegation. Failure to provide a specific reference to the trial court record to support a fact stated in the brief's argument is a violation of MCR 7.212(C)(7), and failure to comply with this rule constitutes abandonment of the issue.²⁸ Moreover, if Hoffman's attorney was assessing compound interest "every month" before 2001 as Kasben alleges, then Kasben had the opportunity to challenge that practice in his previous appeal. Under the principles of res judicata, a party must bring in the initial appeal "all issues which were then present and could have and should have been raised."²⁹ Kasben's failure to raise the issue in his previous appeal constitutes a second ground to consider this issue abandoned,³⁰ and, consequently, we will not consider the issue here.

E. Conclusion

In summary, with respect to the Attorney Fee Order, we conclude that

(1) Kasben's attempts to prevent Hoffman from recouping her attorney fees for his numerous post-trial motions are unfounded.

(2) Judge Rodgers' determination that Hoffman could not afford to bear the expense of further litigation does not meet the standards for a conclusion that he abused his discretion.

(3) Because Hoffman was allowed to request any fees after the 1999 trial, Judge Rodgers was required to make factual findings outside the agreed-on 1999 trial court record. Because Hoffman was permitted to request post-trial attorney fees at any time, Judge Rodgers of necessity required documentation on the issue. The issues for which Kasben wished to reopen proofs had already been litigated at the 1999 trial and facts regarding those issues were on the record.

With respect to the Escrowed Funds Order, we conclude that:

(1) We must reverse the Escrowed Funds Order as well as the Second Amended Judgment and remand for corrections or clarifications on the following issues, and these issues alone:

²⁸ See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

²⁹ *VanderWall v Midkiff*, 186 Mich App 191, 201-202; 463 NW2d 219 (1990).

³⁰ *Id.* at 202.

(a) The amount of credit to which Kasben is entitled for the sale of the marital and Boone farms. On remand, we direct the trial court to determine, through further factual findings if necessary, this amount.

(b) Kasben's interest on the amount of the original judgment. On remand, we direct the trial court either to deduct the interest charged on the judgment or to explain why charging interest was justified.

(c) The trial court shall issue a revised order disbursing escrowed funds that resolves these two issues within sixty days of the release date of this opinion.

(2) Kasben has abandoned the issue of compound interest.

V. Docket No. 254295: The Sanctions Order

A. Standard Of Review

We review the trial court's finding that a party violated MCR 2.114(D) for clear error.³¹

B. Violation Of MCR 2.114(D)

1. Kasben's Argument

Kasben argues that Judge Rodgers erred in finding that Kasben's motion for a new trial violated MCR 2.114(D). The motion was based on the grounds that he was wrongfully denied a trial on the attorney fee issue, that the fee award was excessive and contrary to law, and that Judge Rodgers was mistaken about the facts – specifically, the final judgment was \$288,000, not \$330,000; that Hoffman was not entitled to interest on the divorce judgment because it had been paid when the final judgment was entered; that the interest to which she was entitled should not have exceeded 7% per year; and that the trustee received \$598,930, not \$565,881, from the sale of Kasben's real estate.

2. Judge Rodgers' Finding

In addition to finding that Kasben's motion presented the same issues that had already been ruled on and failed to demonstrate a palpable error, Judge Rodgers found that the motion, "like so much of [Kasben's] conduct over the life of this litigation," was "frivolous" and brought to harass Hoffman and further increase the cost of litigation. Accordingly, Judge Rodgers sanctioned Kasben and his attorney for violating MCR 2.114(D), which provides:

The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

³¹ *In re Attorney Fees and Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

3. MCR 2.114(D)

Even if Kasben's motion was well grounded in fact and warranted by existing law, however, we conclude that there is a separate and independent duty to certify that the document was not filed for an improper purpose, such as to harass the other party. Stated another way, the fact that (2) and (3) are listed separately implies that a filing that meets the requirements of (2) might nonetheless violate (3).

Over the course of this case, both Judge Unger and Judge Rodgers found that Kasben's goal was to drive Hoffman to destitution through litigation. Judge Rodgers concluded that this filing was interposed to "harass [Hoffman] and needlessly continue to increase the cost of this litigation." A finding of fact is clearly erroneous if, after reviewing the entire record, this Court is left with a firm and definite conviction that a mistake was made.³² Given Hoffman's trial testimony that Kasben had threatened to drive her to bankruptcy, and considering that what should have been a relatively straightforward divorce proceeding has taken nearly nine years and is not yet complete, we simply cannot conclude that Judge Rodgers clearly erred in determining that this motion was chiefly filed to harass Hoffman in violation of MCR 2.114(D)(3), even if his claims met the requirements of MCR 2.114(D)(2).

C. Timeliness Of Filing Affidavit Of Fees

1. Kasben's Argument

Kasben asserts that Judge Rodgers clearly erred by finding that Hoffman's faxed affidavit documenting the fees she had incurred was timely. The only support Kasben offers for this position is what appears to be a handwritten letter to him from the Leelanau County Clerk's Office stating, in part, "we cannot accept faxed pleadings and will file your original upon submission."

³² *McNamara, supra* at 183.

2. Abandonment Of The Issue

Apart from the fact that the handwritten document bears no indication that it is authentic, it is not a part of the lower court record and this Court may not consider it.³³ Kasben offers no legal authority for the proposition that a trial court may not accept a filing by fax as timely,³⁴ or for the proposition that a trial court may not determine whether a party has adequately complied with its own order. Accordingly, we deem this issue abandoned.³⁵

D. Predicating Contempt On Failure To Pay Sanctions

1. Kasben's Argument

Kasben argues that Judge Rodgers exceeded his authority by ordering that Kasben's failure to pay the sanctions award of Hoffman's fees and expenses would constitute contempt of court because this type of sanction is more properly classified as damages, which may not be enforced by contempt proceedings.

2. Mootness

The Sanction Order was issued on February 19, 2004, and Kasben was ordered to pay within twenty-eight days or be deemed in contempt of court. Kasben's brief was filed after the twenty-eight day period had elapsed, and there is no indication that Judge Rodgers did, in fact, hold Kasben in contempt. Accordingly, we conclude that this issue is moot.³⁶

We note, however, that a trial court generally has "the inherent right to punish all contempts of court,"³⁷ and specifically has the power to punish as contempt a party's disobedience of a court order.³⁸ While "property-settlement provisions of a divorce judgment may not be enforced by contempt proceedings,"³⁹ this Court has upheld the exercise of the contempt power for enforcing a money judgment where the defendant was "hostile, evasive, and

³³ See *Sherman v Sea Ray Boats, Inc.*, 251 Mich App 41, 56; 649 NW2d 783 (2002), citing *Reeves v Kmart Corp.*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

³⁴ MCR 2.406(B) expressly provides that courts "may permit the filing of pleadings, motions, affidavits, opinions, orders, or other documents by the use of facsimile communication equipment"; however, this rule did not become effective until January 1, 2004.

³⁵ See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

³⁶ See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

³⁷ *Johnson v White*, 261 Mich App 332, 345; 682 NW2d 505 (2004).

³⁸ MCL 600.1701(g); *Kirby*, *supra* at 32.

³⁹ *Guynn v Guynn*, 194 Mich App 1, 2; 486 NW2d 81 (1992), citing *Thomas v Thomas*, 337 Mich 510, 513-514; 60 NW2d 331 (1953); *Chisnell v Chisnell*, 99 Mich App 311, 320; 297 NW2d 909 (1980).

without intention to comply with [the trial court's] orders.”⁴⁰ In this case, because Judge Rodgers found that Kasben had routinely violated court orders, we conclude that Judge Rodgers was within his discretion to threaten Kasben with contempt if Kasben failed to comply with the Sanction Order.

E. Attorney Fees For A Pro Se Litigant

1. Kasben's Argument

Kasben argues that Judge Rodgers erred in awarding Hoffman attorney fees and expenses for her own representation and for her former attorney's assistance in the Sanction Order.

2. *FMB-First Mich Bank* And MCR 2.114

Kasben selectively quotes this Court's decision in *FMB-First Mich Bank*⁴¹ for the proposition that a pro se litigant may not be awarded attorney fees under MCR 2.114. However, this is only partially accurate. While that panel did hold that a pro se litigant could not be awarded attorney fees under MCR 2.114(F), it explained that a trial court had the discretion to fashion an appropriate remedy, including an award of attorney fees, under MCR 2.114(E). As the Court explained:

Because any sanction awarded under MCR 2.114(F) is restricted to the costs and fees as described in MCL 600.2591(2); MSA 27A.2591(2), we hold that attorney fee sanctions [for pro se litigants] are not available under MCR 2.114(F). In contrast, MCR 2.114(E) grants the trial court discretion to fashion an "appropriate sanction," which may include, but is not limited to, an order to pay the opposing party the reasonable expenses incurred (*including attorney fees*).^[42]

Here, Judge Rodgers awarded Hoffman \$3,535.70 for attorney fees and expenses pursuant to MCR 2.114(E), not MCR 2.114(F). Thus, Judge Rodgers was not only authorized to award Hoffman attorney fees for her own services and those of her attorney, who evidently assisted her in responding to Kasben's motion for new trial, he had the discretion to fashion a sanction that exceeded the actual reasonable expenses incurred.

We note that Kasben also argues that Hoffman should not be awarded any fees for her attorney's services after she filed her answer to his motion for a new trial on December 9, 2003. However, her attorney's affidavit indicates that Kasben filed a reply to her answer on December 18, 2003. Kasben also asserts that Hoffman's response to his motion should not have taken twenty-four hours of an attorney's time. Considering that Kasben is not an impartial observer in this hotly contested, acrimonious divorce suit, we defer instead to the trial court's conclusion that

⁴⁰ *American Oil Co v Suhonen*, 71 Mich App 736; 248 NW2d 702 (1976).

⁴¹ *Id.*

⁴² *Id.* at 727 (emphasis added).

the fees were justified. As noted, Judge Rodgers' discretion to fashion an appropriate remedy was not limited to the actual fees and costs.⁴³ Accordingly, we conclude that Judge Rodgers did not clearly err in awarding Hoffman sanctions under MCR 2.114(E).

F. Conclusion

In summary, as to the Sanctions Order, we conclude that:

(1) Judge Rodgers did not clearly err in determining that Kasben's motion was chiefly filed to harass Hoffman in violation of MCR 2.114(D)(3), even if Kasben's claims met the requirements of MCR 2.114(D)(2).

(2) Kasben has abandoned his argument with respect to the timeliness of the filing of affidavit concerning fees.

(3) Kasben's argument with respect to Judge Rodgers' authority to impose contempt sanctions is moot.

(4) Judge Rodgers was authorized to award Hoffman attorney fees for her own services and those of her attorney, who evidently assisted her in responding to Kasben's motion for new trial and he had the discretion to fashion a sanction that exceeded the actual reasonable expenses incurred.

Affirmed as to the Attorney Fees Order and Sanction Order, reversed in part as to the Second Amended Judgment and Escrowed Funds Order, and remanded for corrections to the Escrowed Funds Order, as stated herein and only as stated herein. These corrections are to be completed within sixty-three days of the release date of this opinion. We retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Richard A. Bandstra

⁴³ *Id.*